



August 26, 2020

Via email: consultations@flsc.ca

David Swayze
Chair, Standing Committee on the Model Code of Professional Conduct
Federation of Law Societies of Canada

Dear Mr. Swayze:

Re: Proposed Amendments to the Model Code of Professional Conduct

We write on behalf of the Equality Subcommittee and the Ethics and Professional Responsibility Subcommittee of the Canadian Bar Association (CBA Subcommittees) to comment on amendments to the Model Code of Professional Conduct (Model Code) proposed in a consultation report dated January 29, 2020.¹

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Equality Subcommittee is dedicated to achieving equality in the legal profession, in particular on the basis of sex, gender, sexual orientation, gender identity, race, national or ethnic origin, colour, religion, language, age or disability. The CBA Ethics and Professional Responsibility Subcommittee is dedicated to fostering and advancing ethical and professional conduct and standards in the legal profession.

After consulting with other interested CBA Sections, the CBA Subcommittees are generally supportive of the proposed changes to the Model Code relating to discrimination and harassment. We also support the changes to the provisions on *ex parte* proceedings and communications. Below, we offer specific comments and suggestions for improvement. For ease of reference, our comments are organized according to the sections of the proposed commentary they relate to.

Discrimination and Harassment

General Comments on Proposed Amendments

The CBA Subcommittees believe that a lawyer's conduct outside their office or legal practice should fall within the jurisdiction of the law societies because of a lawyer's unique position in society. We understand there are differing views on this issue in the profession. The CBA's 2009 Code of

¹ [Consultation Report, Model Code of Professional Conduct](#), Federation of Law Societies (2020)

Professional Conduct adopted definitions of discrimination, harassment and sexual harassment that were limited to professional conduct.² The consensus among the CBA Subcommittees and Sections consulted has since evolved.

We believe that the public's confidence in the administration of justice and the rule of law may be eroded by a lawyer's improper conduct outside of their legal office or practice. Law is a self-governing profession, so lawyers must exercise their powers in the public interest. It is therefore appropriate for the Model Code to expand on what constitutes discrimination, harassment, and sexual harassment to set standards for a lawyer's conduct in all contexts.

6.3-1 and Commentary

For Commentary 2, we recommend deleting reference to Rule 6.3-5 and replacing it with reference to Rule 6.3-4, because Rule 6.3-5 is being deleted.

The CBA Subcommittees also recommend inserting a final paragraph in the Commentary to state that Rule 6.3-1 "is not limited to conduct related to, or performed in, the lawyer's office or in legal practice." There is no reason to have this provision for harassment and sexual harassment (Rules 6.3-2 and 6.3-3), but not for discrimination (Rule 6.3-1).

6.3-2 and Commentary

For Commentary 4, we recommend clarifying that bullying does not have to be persistent and repeated behaviour, but could also arise from a single serious incident. We suggest revising the wording to: "[i]t is usually characterized by persistent and repeated negative behaviour towards an individual or group of individuals, but could also arise from a single serious event."

For Commentary 4(e), we recommend replacing "assigning seniority inappropriate work" with "assigning work inappropriate to one's seniority or experience." This revision would make the commentary clearer and more precise.

6.3-3 and Commentary

For Commentary 1(d), the CBA Subcommittees recommend inserting "Training;" as a new subparagraph (v) as training is another relevant example of an employment decision. The former subparagraph (v) would become subparagraph (vi).

For Commentary 1(g), we recommend inserting "when" at the beginning of the sentence, which would make it consistent with 1(a)-(f).

Ex Parte Proceedings and Communications

5.2-1A and Commentary

For Rule 5.2-1A, the CBA Subcommittees recommend replacing "the client's interest" with "that party's interest". This revision recognizes that not all lawyers who conduct *ex parte* proceedings represent a client (for example prosecutors). The phrase "that party's interest" is more inclusive of all *ex parte* proceedings where Rule 5.2-1A should apply.

For Commentary 3, we recommend replacing "giving notice" with "giving advance notice".

² Canadian Bar Association, [Code of Professional Conduct](#), 2009 at 7 and Chapter XX.

5.2-1B and Commentary

For Commentary 4, the CBA Subcommittees recommend replacing “giving notice” with “giving advance notice”.

We would be pleased to clarify our recommendations or discuss them in more detail.

Yours truly,

(original letter signed by Nadia Sayed for Steeves Bujold and Craig M. Yamashiro)

Steeves Bujold
Chair, Equality Subcommittee

Craig M. Yamashiro
Chair, Ethics and Professional Responsibility Subcommittee